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IN THE

Supreme Court of the United States

October Term, 1959

No. 238

THOMAS E. PROCTOR 2nd, JOHN RIKER PROCTOR, ESTHER B. PROCTOR, MARY P. CASE, EMMA M. RICE, GERALDINE M. CRAIG, NEIL W. RICE, HILDA R. AYER, THOMAS E. P. RICE; and THOMAS M. REYNOLDS, DAVID BROUDE and BOSTON SAFE DEPOSIT AND TRUST COMPANY, Trustees Under the Last Will and Testament of THOMAS E. PROCTOR, Deceased,

Petitioners

vs.

THE SAGAMORE BIG GAME CLUB, THE SYLVANIA CORPORATION, UNITED NATURAL GAS COMPANY, NATIONAL FUEL GAS COMPANY, FRANK G. ALTMAN, H. P. BOARTS, F. E. CARROLL, W. L. CARROLL, A. J. EISENHUTH, H. U. FLICKINGER, JOHN W. FLICKINGER, BERTHA E. JONES SHEARER, JOHN RUMMEL, A. D. THOMAS, WILLIAM WALKER, D. D. FLICKINGER, ANTONIA JOHNSON, CLYDE K. MOORE, GEORGE C. SCHRECONGOST, R. L. SEGER, L. E. THOMAS and E. C. WAREHAM,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 238

Thomas E. Proctor 2nd, John Riker Proctor, Esther B. Proctor, Mary P. Case, Emma M. Rice, Geraldine M. Craig, Will W. Rice, Hilda R. Ayer, Thomas E. P. Price; and Thomas M. Reynolds, David Bronde and Boston Safe Deposit and Trust Company, Trustees Under the Last Will and Testament of Thomas E. Proctor, Deceased,

Petitioners

vs.

The Sagamore Big Game Club, The Sylvania Corporation, United Natural Gas Company, National Fuel Gas Company, Frank G. Altman, H. P. Boarts, F. E. Carroll, W. L. Carroll, A. J. Eisenhuth, H. C. Flickinger, John W. Flickinger, Bertha E. Jones Shearer, John Rummel, A. D. Thomas, William Walker, D. P. Flickinger, Antonia Johnson, Clyde K. Moore, George C. Schreengost, R. E. Seger, L. E. Thomas and E. C. Wareham,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

In response to the Petition of plaintiffs to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, which affirmed a judgment of the United States District Court for the Western District of Pennsylvania in the above entitled action, Respondents pray that the Petition for a Writ of Certiorari be denied.

OPINIONS BELOW

The opinion of the District Court is reported in 166 F. Supp. 463. The opinion of the Court of Appeals is reported in 265 F. (2) 196.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1959. Plaintiffs' Petition for a Re-Hearing was denied on April 27, 1959. Petition for Writ of Certiorari was filed July 22, 1959. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 56. Summary Judgment of Federal Rules of Civil Procedure:

(c) ". . . The Judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . ."

(e) ". . . Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . ."

QUESTIONS PRESENTED

1. Where plaintiffs filed a Motion for Summary Judgment, following a similar Motion by defendants ten days earlier, by which they moved the Court to enter summary judgment for plaintiffs in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure,

> "on the ground that the pleadings, the admissions, the replies to interrogatories, the parties' statements of position and the replies thereto and the rebuttals thereof, and all and singular any further matters of record unspecified herein in the case, show that the plaintiffs are entitled to judgment against the defendants as a matter of law,"

does not such Motion constitute a submission to the Court as a matter of law of plaintiffs' right of recovery, and can the plaintiffs, after an adverse decision by the Court, successfully claim that they have been deprived of a trial by jury?

2. Are self-serving unverified statements of fact by plaintiffs' attorneys, filed at pre-trial conference, but which were not at any time followed by an offer of evidence admissible in the case, or do they constitute such proof as is required for the resolution under Rule 56(c) and 56(e) of a Motion for Summary Judgment?

3. Where, as in this case, jurisdiction depends solely on diversity, and the question involved is to be determined by the laws of Pennsylvania, statutory and decisional, and both Federal Courts below have decided that question in conformity with Pennsylvania law, is that question now subject to review in this Court?

STATEMENT

This action involves the title and right to possession to a tract of 1400 acres of unseated land in Benezette Township, Elk County, Pennsylvania, being Warrant 5343. Unseated lands, under the law of Pennsylvania, are alone and solely liable for the tax assessed thereon, there being no charge upon the owner thereof for such tax. (*Powell vs. Lantzy*, 173 Pa. 543, at p. 547 and 550.)

Title to the Warrant vested in Thomas E. Proctor, Sr., by deed dated June 5, 1893. When that conveyance was made, the taxes for 1892 and 1893 on the land were unpaid and were a lien thereon. Proctor having allowed the 1892 taxes to remain unpaid for the statutory period of two years, the land was sold by the County Treasurer at public sale on June 11, 1894, and was bid in by George W. Childs for the amount of the defaulted taxes and costs. The County Treasurer's deed to George W. Childs, acknowledged in open Court on July 3, 1894, was recorded in Elk County Deed Book W at page 468 (Appendix to Appellants' Brief in Circuit Court, 7a). Both the Courts below (the District Court and the Circuit Court); following *Central Pennsylvania Lumber Co. v. Bristol*, 250 Pa. 61, found the foregoing facts to be uncontroverted (opinion, District Court, 166 F. Supp. 465, at page 468; opinion Circuit Court, 265 F. (2) 196, at page 199).

George W. Childs and wife assigned his deed to Elk Tanning Company on June 28, 1898, which was recorded in Elk County Deed Book W at page 480. The Courts below

found these facts, and that the claim of the defendants rests upon the tax sale to Childs, the assignment of the tax deed to Elk Tanning Company, and subsequent conveyances and leases.

The District Court and the Circuit Court both held that the acknowledgment of the Treasurer's deed delivered to George W. Childs did in fact take place in open Court on July 3, 1894 (District Court opinion, 166 F. Supp. 465, at page 470; Circuit Court opinion, 265 F. (2) 196, at page 200).

Under the law of Pennsylvania a deed from a County Treasurer for unseated land sold for the nonpayment of taxes, if the sale is otherwise regular (the regularity of the sale of June 11, 1894, being admitted in this case), becomes incontestable and valid if there is no redemption from the tax sale within two years from the date thereof. Both of the Courts below found as a fact that there was no redemption from the tax sale in question (District Court opinion, 166 F. Supp. 465, top of page 469, and Circuit Court opinion, 265 F. (2) 196, Note 6, page 201).

In respect of the question of redemption, the District Court and the Circuit Court both applied the law as stated in the Act of April 3, 1804, 4 Sm. L. 201, and did not decide the question of redemption under the provisions of the Act of May 5, 1941, P. L. 38, Section 1; 21 P.S. 283, as inferred by the Petitioners. (See opinion of the Circuit Court, 265 F. (2) 196, at page 200.) However, the contention that the Act of 1941 denied the right of redemption is erroneous.

The second Treasurer's sale of this land for defaulted taxes of 1912 and 1913 occurred on June 8, 1914, upon an

assessment to Central Pennsylvania Lumber Company. The purchaser at such public sale was C. H. McCauley, Jr., who bid the property in for the unpaid taxes and costs. The County Treasurer's deed to McCauley was duly acknowledged and was recorded in Elk County Deed Book 138 at page 99. McCauley and wife conveyed without reservations or exceptions, to Andrew Jackson Eisenhuth and wife by deed recorded in Elk County Deed Book 86 at page 518. The Central Pennsylvania Lumber Company also conveyed to Andrew Jackson Eisenhuth, with no exceptions or reservations, by deed recorded in Elk County Deed Book 80 at page 451 (see Appellants' Appendix to Brief in Circuit Court, 66a). Andrew Jackson Eisenhuth and wife conveyed to The Sagamore Big Game Club, a defendant, by deed recorded in Elk County Deed Book 81 at page 217.

Jurisdiction being in the Federal Court by diversity of citizenship only, and title to land in Pennsylvania being in question, the law governing the case is the law of Pennsylvania, as held by *Guaranty Trust Co. vs. York*, 326 U.S. 99, and *Erie Railroad Co. vs. Tompkins*, 304 U.S. 63; and both the Federal District Court and the Circuit Court found the law of Pennsylvania, both statutory and decisional, supported the contentions of defendants.

Motions were filed by both defendants and plaintiffs requesting the Court to enter summary judgment upon the whole record as a matter of law. The District Court, after consideration, entered judgment in favor of the defendants and against the plaintiffs which judgment was affirmed by the Circuit Court of Appeals.

REASONS FOR REFUSING THE PETITION FOR CERTIORARI

The key to the determination by the Supreme Court of this Petition for a Writ of Certiorari is (1) the filing by plaintiffs in the District Court of "Plaintiffs' Cross-Motion for Summary Judgment"; (2) the Pennsylvania Statutes of Limitation; and (3) laches of plaintiffs over a period of sixty years, all of which are ignored by counsel for plaintiffs in their Petition.

(1) That Motion was in the following form (Appendix to Brief of Appellants filed in the Circuit Court, page 123a):

"Plaintiffs' Cross Motion for Summary Judgment

"The plaintiffs, Thomas E. Proctor, 2d, et al., by their attorneys, Herbert R. Carroll, Esquire, John C. Youngman, Esquire, John H. Cartwright, Esquire, and Evans, Ivory & Evans, Esquires, hereby move the Court to enter summary judgment for the plaintiffs, against The Sylvania Corporation and United Natural Gas Company, defendants, in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings, admissions, the replies to interrogatories, the parties' statements of positions and the replies thereto and the rebuttals thereof, and all and singular any further matters of record unspecified herein in the case, show that

the plaintiffs are entitled to judgment against said defendants as a matter of law.

Herbert R. Carroll
John C. Youngman
John H. Cartwright
Evans, Ivory & Evans
Attorneys for Plaintiffs

October 21st, 1957."

The filing date was ten days after the filing by the defendants of a similar motion.

The events in the course of this litigation leading up to the filing of these motions are substantially as follows:

A motion by the defendants for an order on plaintiffs to file an abstract of title was denied by the Judge of the District Court (128 F. Supp. 885, 889), in which decision also the action was dismissed as to the National Fuel Gas Company. Instead, the Court suggested procedure under Federal Rule 36 by the filing on behalf of either or both parties of Requests for Admissions, which was done. Thereafter, a pre-trial conference was set by the Court at Pittsburgh on September 26, 1957, for the consideration of the Requests for Admissions and Answers thereto at a time when the trial of the cause was in contemplation (see opinion of Circuit Court of Appeals, 265 F. (2) 196, 199). The net result of such pre-trial conference is shown by the following quotations from the record as contained in the Appendix to Brief of Defendants, Appellees, submitted with their brief to the Circuit Court:

Page 4b of Appendix referred to:

"The Court: You do not make any contention, do you, Mr. Carroll, that Thomas Proctor paid those taxes for that year in question, do you?

"Mr. Carroll: We do not."

Page 7b of Appendix referred to:

As to the Treasurer's Acknowledgment Book B showing the acknowledgment of deed to George W. Childs in Open Court:

"The Court: Well, * * * I am going to leave it that the Treasurer's Acknowledgment Book B shows the transaction in accordance with the defendants' request for admission. Now, the effect of that failure, if any, of the Court record to show or fail to show the Treasurer appeared there, will be for the Court to decide * * *

"Mr. Carroll: If the Court please, I believe all we have there is the legal effect of certain records. * * *

"The Court: (to Mr. Carroll) They are trying to get you to admit that the tax sale wiped out your oil and gas rights and you say no. They assert that there was no redemption from that sale.

"Mr. Carroll: I dare say, your Honor, the record is conclusive."

Appendix referred to page 9b:

Defendants' Request 24 alleging that no redemption from the tax sale was ever exercised by Thomas E. Proctor or by anyone for him or by his heirs at law:

"Answer: The plaintiffs admit that if a redemption was necessary to avoid said alleged tax sale, no such redemption was made."

Page 22b of Appendix referred to:

At pre-trial hearing before Judge Willson on September 13, 1957, in a discussion as to whether the issue

was solely one for the Court, the Court said, addressing Mr. Carroll:

"The Court: The point is, the Court is going to have to decide whether that title that the Sagamore got in 1920 is subject to all those matters you people raise, whether somebody must have looked outside the records and docket entries, treasurers' sales and various deeds in Elk County. That is the issue in this case, do you agree with that?

"Mr. Carroll: The defendants say so, if the Court please. We say one examining the title to this tract of land in Elk County is not obliged under any circumstances to go beyond what might appear on the public records of the several offices of Elk County.

"The Court: That is right. I understand that is your position.

"Mr. Carroll: Now, of course, we take a much broader view.

"The Court: In other words, if I decide they are correct from that viewpoint, have you got a title?

"Mr. Carroll: Not in this Court, your Honor.

"The Court: * * * Why don't you say yes or no then? In other words, if their position is correct that they don't have to look beyond the records of Elk County, your case goes out the window. Is that right?

"Mr. Carroll: That is right."

Page 24b of Appendix:

At pre-trial hearing September 23, 1957:

"The Court: Mr. Carroll, to go a step further, is it your contention that you can show that the Treasurer

of Elk County actually received those taxes for this year in question?

"Mr. Carroll: No, your Honor, we can't."

Page 25b of Appendix:

The following excerpt from Plaintiffs' Reply to Defendants' Statement of Position relative to an alleged contract in writing between Elk Tanning Company and Proctor:

"It is *apparent* that Elk Tanning Company sometime during the year 1893 acquired an equitable title to or interest in the land in question; furthermore, *there is little doubt* that such title or interest was acquired by virtue of a written agreement made in 1893 between Proctor and the company. There is nothing in the public record to evidence such title with *clarity or certainty*. Many of the old records of Proctor and of his estate, and all those of Elk Tanning Company and of United States Leather Company which pertained directly thereto, appear to *have been long since destroyed*. Nevertheless, ample evidence remains, which points to the inescapable conclusion of the fact of the existence of such equitable title or interest." (Italics supplied.)

The background of these admissions by counsel in open Court and the answers to Requests for Admissions prompted the Court to suggest that a motion or motions for Summary Judgment be filed under the Federal Rules. In such an atmosphere of reluctant, though binding, concessions as to all the alleged facts that possibly could do the plaintiffs any good, motions under Federal Rule 56 for Summary Judgment were filed, first by the defendants

and ten days later, after ample time for consideration, by the plaintiffs.

Having asked the Court in such motion to dispose of the whole case as a matter of law, and having gotten an adverse decision from the Court—in other words, having gambled and lost—they now come forward with the amazing proposition that they intended their motion to be a waiver of a jury trial only if they got a decision from the Court and judgment in their favor, and now insist that they have been wrongfully deprived of their right of trial by jury. On this record there is no genuine issue as to any material fact for a jury. (Opinion Circuit Court, 265 F. (2) 196, page 198).

The form of the Motion for Summary Judgment as above quoted appears to clearly indicate that the plaintiffs intended to submit, and did submit, their whole case to the Court for disposition as a matter of law, without any reservation whatsoever.

Where defendants filed a Motion for Summary Judgment and plaintiffs filed a counter Motion for Summary Judgment, the plaintiffs thereby conceded that there was no genuine issue as to any material fact, and therefore judgment on the record was proper. The following authorities support this position:

Fox vs. Johnson and Wimsatt, 127 Fed. 2d 729;

Steiner vs. United States, 36 F. Supp. 496;

Sena vs. American Turquoise Company, 220 U.S. 497.

This doctrine of itself will sustain the judgment entered on the law in this case in favor of the defendants.

In the face of the facts recited from the record, the Petition under consideration contains nothing in support of the position that plaintiffs have been deprived of their right of trial by jury, except a reiteration and repetition of unverified statements of counsel, devoid of any evidentiary value, which neither are nor could be of any avail in the disposition of Plaintiffs' Cross-Motion for Summary Judgment under Rule 56(c) or 56(e), and which are definitely negatived by the admissions of plaintiffs hereinbefore set forth (Circuit Court Opinion, 265 F. (2) 196, at page 199).

(2) The Statutes of Limitation in Pennsylvania are insuperable bars to the maintenance of any action by the plaintiffs here.

There are two Pennsylvania statutes, the Act of April 3, 1804, P. L. 517; 4 Sm. L. 201, which provides:

> "No action for recovery of said lands (unseated lands sold at tax sale) shall lie unless the same be brought within five years after the sale thereof for taxes as foresaid * * *."

Also, the Act of April 22, 1856, P. L. 532, §6; 12 P. S. 83, which provides (Both quotations are from the report of the case in 265 F. (2) 196, at page 202):

> "No right of entry shall accrue, or action be maintained * * * to enforce * * * any implied or resulting trust as to realty, but within five years after such * * * trust accrued * * *; provided, that as to any one affected with a trust, by reason of his fraud, the said limitation shall begin to run only from the discovery thereof, or when, by reasonable dlligence, the party

defrauded might have discovered the same * * *"
(Inapplicable language deleted.)

Quoting from the opinion of the Circuit Court, 265 F.
(2) 195, at page 202:

"Fraud can be proven only by evidence that is clear, explicit and unequivocal (citing cases).

"Not only is the record devoid of proof which meets this high standard, but it is barren of any evidence of fraud in the circumstances attending the tax sale * * *. In these circumstances, the Statute of Limitations presents an insuperable bar to the action."

These statutes had been in force in Pennsylvania, the Act of 1804 for 90 years, and the Act of 1856 for 38 years, at the time of the tax sale, and were binding upon Thomas E. Proctor and his heirs at law, the plaintiffs in this action.

In a recent case in Pennsylvania, *Rose vs. Suburban County Realties Corporation*, 356 Pa. 126, 129, it was held that:

"Where fraud is alleged the trust is barred within five years of the discovery of the fraud or the time by the exercise of reasonable diligence it should have been discovered."

If there was fraud at the tax sale of 1894, such as now alleged, Proctor would have had knowledge of it and the simple thing for Proctor to have done would have been to have brought his action to defeat that sale, or to have gotten a transfer from Childs of the tax deed received from the County Treasurer.

No attempt is made in the Petition for Certiorari to surmount this barrier to maintaining an action.

(3) The plaintiffs are estopped by their laches over a period of 60 years from asserting any claim to the land in question or the gas thereunder.

Not from 1894, the date of the tax sale which disposed of Proctor's interest, to the year 1954, the date of bringing this suit, was there the faintest suggestion that Proctor or his heirs laid any claim to this Warrant or any part of it. The plaintiffs' claim is a stale one, a very, very stale one of the kind that Pennsylvania decisions and Federal decisions alike have over and over stigmatized as having no appeal to the conscience of a Court of Justice. See *Goggins vs. Risley*, 13 Pa. Superior Ct. 316, 322; *Kinter vs. Commonwealth Trust Company*, 274 Pa. 436, 442; *Edwards vs. Western Maryland Railway Company*, 268 Pa. 228, 230; *Patton vs. Commonwealth Trust Company*, 276 Pa. 95, 99; *Thompson vs. Roe*, 16 U.S. Supreme Court Reports 385 (22 Howard 422), in which case the Court said:

> "In this case, the owners of the tax title have had the possession, paid the taxes, built and made valuable improvements on the lot, in the presence of the former owners, for nearly twenty years. Under such circumstances a Court of Justice should be unwilling to exercise any judicial ingenuity to forfeit even a tax title, where the former owners have been so slow to question its validity."

Under the Pennsylvania Statute of March 28, 1806, 4 Sm. L. 336, it was the duty of every holder of unseated land to furnish the County Commissioners a statement describing the tract, from which it became the duty of the Commissioners to assess the same for taxation. This obligation was not assumed by the plaintiffs on the purported

reserved gas estate. On the contrary, they have permitted the taxes on the entire Warrant to be assessed to and paid by others. Having failed to comply with this statute, if the plaintiffs actually believed they had an estate in the Warrant, they cannot now set up as an excuse that there was no known evidence of the existence of such mineral estate, and that it was therefore not subject to taxation. Under this statute the holder of the unseated land or of a mineral estate thereunder is required to notify the taxing authorities of such a holding, and the Commissioners, not the landowner, determine what is to be its assessable value (*Hutchinson vs. Kline*, 199 Pa. 504).

In *Patton vs. Commonwealth Trust Company*, 276 Pa. 95, opinion at page 99 it is said:

"Laches is not excused by simply saying: 'I did not know.' If by diligence a fact can be ascertained, the want of knowledge so caused is no excuse for a stale claim. The test is not what the plaintiff knows, but what he might have known, by the use of the means of information within his reach, with the vigilance the law requires of him." See Scranton Gas & Water Co. vs. Lackawanna Iron & Coal Co., 167 Pa. 136. In 21 C. J., p. 402, the rule is thus stated: "Where ignorance of rights or wrongs is relied on to account for laches, this fact must be plainly alleged in the bill. A general averment of plaintiff's ignorance of his rights is insufficient; he must allege why he was so long in ignorance and the means used to keep him so, that the facts could not have been discovered by the exercise of due diligence, and must acquit himself of all knowledge of facts which would put him on inquiry."

The Elk County assessment has been of the entire interest in the Warrant, in the names of Elk Tanning Company, Central Pennsylvania Lumber Company, Andrew Jackson Eisenhuth, and The Sagamore Big Game Club, for the years 1895 to 1954 inclusive.

Without having recognized for more than half a century any obligation of ownership or asserted any claim against the record title holders who held in open and notorious possession, the plaintiffs now seek to enrich themselves at the expense of the defendants, respondents here, whose initiative, energy and capital have developed and given value to the gas rights in the Warrant. The equities in the case are all in favor of the defendants.

Supreme Court on Certiorari will not review fact questions found in Respondents' favor by both Courts below.

The relevant and material facts are undisputed. There is no issue for a jury. Both Courts below so found. Mr. Chief Justice Hughes stated the applicable rule substantially as follows:

> Where on questions of fact both Courts decided against the petitioners, this Court under the well established rule accepts the findings in which two Courts concur, unless clear error is shown.
>
> *Texas & New Orleans Railroad Co. vs. Brotherhood of Railway & Steamship Clerks et al*, 281 U.S. 548;
>
> *Paine vs. Arkansas Nat. Gas Corp.*, 286 U.S. 418;
>
> *Just vs. Chambers*, 312 U.S. 383.

In the order stated in the Petition, we answer each of the several "questions presented" therein.

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(1) The finding of the District Court and of the Circuit Court of Appeals that there was no payment of the taxes of 1892 and no redemption of the land after the tax sale of 1894 are attacked by Petitioners who allege that they offered evidence which, if believed by a jury, would sustain the contrary.

The admissions of counsel for Petitioners above reproduced completely refute such allegation. There was no offer of evidence of such nature.

Petitioners contended that Proctor made an agreement with Elk Tanning Company to convey Warrant 5343 in question along with other lands, upon an exception and reservation of the minerals, gas and oil, free and clear of debts through the year 1892.

There was no offer to prove such agreement; on the contrary, that contention proved to be baseless on the admission of counsel. It was so found by both the District Court and the Circuit Court of Appeals.

At the sale of the Warrant for the unpaid taxes of 1892, C. W. Childs was the purchaser, and Petitioners allege that Childs was then acting on behalf of Elk Tanning Company. There is no relevant proof in this case to sustain the assertion that Childs was acting for anyone other than himself at said tax sale.

The affidavit of John G. Flemming submitted to the District Court by Petitioners, is of no value to the cause

of Petitioners, since it does not show affiant to be competent to testify to the matters stated therein as required in Rule 56(e), and otherwise does not comply with said Rule. Although it contained statements of account with Proctor's estate of the financing of the taxes and other charges pertaining to certain lands situate in Clearfield County, Lycoming County and Sullivan County, there is no mention made in said financial statement of any taxes or charges on any lands in Elk County where Warrant 5343 is situate. The alleged agreement between Proctor and Elk Tanning Company is not confirmed by Affiant Fleinning, who, on the contrary, only says that a Boston trust company has in its custody a "form of agreement which plaintiffs *claim* was made" on or about May 1, 1893, between Proctor and Elk Tanning Company for conveyance of said Warrant 5343, excepting minerals, oil and gas, whereas, the deed record shows that on May 1, 1893, Proctor did not then own said Warrant and did not acquire same until by deed dated June 5, 1893.

These allegations amount to no more than wishful thinking.

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(2) Neither the District Court nor the Court of Appeals erred in holding that on October 1, 1894, Proctor had no title to convey so as to except or reserve the right to the gas.

It is the recognized doctrine that a plaintiff in ejectment must recover *solely* on the strength of his own title.

Proctor had lost all his title to Warrant 5343 by the tax sale. He had no title in said Warrant on October 1,

1894, either to convey or reserve. His attempt at reservation was a futile thing and a nullity. By his deed to Elk Tanning Company he could not breathe life into or give vitality to a reservation which was void, or confer upon it a legality or an existence which it did not have when such attempt was made. All he could convey by that deed was the right of redemption.

If the attempted reservation of the natural gas by Proctor were to be given the effect contended for by the Petitioners, the result would be to preserve ownership of that which was sold at the Treasurer's sale.

If it is assumed, for sake of argument only, that Proctor had a right to the gas when he made the attempted reservation in the deed of October 1, 1894, it is admitted that there was no redemption from the tax sale. Redemption was necessary to fully restore such alleged right. For the reasons stated, that deed has no evidentiary value and could not estop the defendants. Nothing was done after the tax-sale to establish any valid title of record in Proctor, either by redemption or on any other theory.

---

(3) The doctrine that parties and privies to a deed are bound by recitals in such deed, has no application to the case at bar.

The Petitioners contend that because the defendants in their abstract of title recited the deed from Thomas E. Proctor and wife to Elk Tanning Company, they are stopped by such fact from denying the title which Petitioners claim to the natural gas under the reservation attempted by Proctor.

The deed from Thomas E. Proctor to Elk Tanning Company was included in defendants' abstract for the purpose of showing that there were eighteen separate parcels of land conveyed by that deed. Such exception or reservation was placed in that deed following the description of all of the 18 parcels and was not applicable *alone* to Warrant 5343 as inferred from the Complaint of the plaintiffs filed in the District Court and which the defendants then believed was the inference intended. The Complaint made no reference to the tax sale of June 11, 1894.

The defendants' claim of title is under the tax deed from the County Treasurer to George W. Childs, dated June 11, 1894. The deed under which the Petitioners claim the estoppel arises is the deed from Thomas E. Proctor to Elk Tanning Company dated October 1, 1894. It is apparent that the title under which the defendants claim is not by deed from Proctor but is from George W. Childs, a stranger to the record, which is the anterior title to that purported to have been conveyed to Elk Tanning Company, and is the deed which is paramount in its inception.

The rule that recitals in deeds may bind the parties and those in privity is subject to the exception that such recitals are not evidence against a stranger or other person claiming under a title derived from the grantor before the deed was made containing such recital.

The exception is well stated in *Carver vs. Jackson*, 29 U.S. 1, 7 L. Ed. 761, 790, as follows:

> "But it does not bind mere strangers or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title or persons claim-

ing from the parties by title anterior to the date of the reciting deed."

and the rule in Pennsylvania is the same as stated in *Daugherty vs. W[illegible]ana*, 233 Pa. 124, Op. 133.

The deeds in the abstract of title are all a part of the records of Elk County with reference to the title to Warrant 5343 and are part of the history of that title. In the deed subsequently made by Elk Tanning Company for said 18 parcels of land, including Warrant 5343, the interest intended to be conveyed by the deed is expressed to be "the right, title, interest and estate, but *no greater than* is now held by the Elk Tanning Company, of, in and to the lands hereinbefore mentioned". See photo copy of this deed, Appendix to Brief for Defendants, Circuit Court, following 26b.

Obviously, these deeds did not create recitals binding on the defendants and consequently did not estop the defendants.

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(4) The District Court and the Court of Appeals correctly held that the Memoranda of the Prothonotary of Elk County were part of the Record of the Acknowledgment by the Treasurer of his Deed.

The acknowledgment by the County Treasurer of his deeds is prescribed by the Pennsylvania Statute of April 1804, 4 Sm. L. 201, as follows:

"All unseated lands . . . shall . . . be valued and assessed . . . but collection of taxes on unseated lands shall not be enforced . . . until the county commis-

sioners shall issue their warrant . . . directed to the Sheriff . . . (later changed to County Treasurer) commanding him . . . to make public sale . . . of unseated lands . . . and to make and execute . . . deeds in fee simple to the . . . purchasers . . . *and the same in open court of Common Pleas of the proper county duly to acknowledge* . . . ." (Emphasis supplied.)

It will be noted there is no statutory provision as to the manner or method of how the acknowledgment of deeds by the County Treasurer in open court is to be entered among the records kept of the proceedings.

The weight of Pennsylvania decisions is to the effect that the records kept by the Prothonotary of this proceeding, even though in more than one book related to the same subject matter, are deemed to be in pari materia and constitute the record and to thus conform to the statutory requirement. *Central Pennsylvania Lumber Co. vs. Bretol*, 250 Pa. 61.

Each of the Courts below found the acknowledgment by the County Treasurer of his deed to George W. Child to be proper.

(5) Petitioners' Constitutional rights to due process have not been violated.

Petitioners complain of the ruling by the Court of Appeals that the Pennsylvania Act of May 5, 1941, P.L. 38, Sec. 1, 21 P.S. 283 (which was enacted to validate treasurer's sales and treasurer's deeds when the records the actual acknowledgment of tax deeds by County Treas-

any) was irregular or defective), was applicable to the Treasurer's deed in this case because they say this legislation gives no right of redemption after such sales were thus validated.

This attack on the statute in question is baseless. The contention that this statute denies or takes away the right of redemption is erroneous. It simply validates the sale and makes no change in the existing right of redemption.

To contend that this statute is unconstitutional on the ground that it denies the existing right of redemption is untenable. There is no change made by it in the settled usages and modes of procedure prescribed by law for redemption.

Moreover, the decision of the Circuit Court, 265 F. (2d) 196, Opinion 200, shows that the Circuit Court followed exactly the conclusion of Judge Wilson in the District Court in holding that "The contention that the tax deed was invalid because it was not acknowledged in open Court, is untenable."

CONCLUSION

For the foregoing reasons, the Respondents pray that the Writ of Certiorari be denied.

Respectfully submitted,

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